Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98

JOINT COMMENTS

The National Exchange Carrier Association, Inc. (NECA), National Rural Telecom Association (NRTA), National Telephone Cooperative Association (NTCA), Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), and Western Alliance, submit these Comments in response to the January 24, 2001 *Public Notice* in CC Docket No. 96-98. The *Public Notice* seeks comment on issues raised in conjunction with the use of combinations of unbundled network elements (UNEs) to provide exchange access service.[1]

I. Carriers Do Not Need Access to Loop-Transport UNE Combinations To Provide Competitive Access Services.

Comments previously filed in this docket warn the FCC that allowing requesting carriers to purchase loops and transport at TELRIC rates, as a substitute for tariffed access services, would disrupt existing access charge cost recovery mechanisms and cause substantial harm to local exchange carriers and their customers.[2] Congress did not

[1] Comments Sought on the Use of Unbundled Network Elements to Provide Exchange Access Service, CC Docket No. 96-98, *Public Notice*, 66 Fed. Reg. 8555 (2001).

[2] *See e.g.*, Jan. 19, 2000 Comments of USTA at 23; Associations at 3-4; BellSouth at 17; SBC at 16.

intend this result when it enacted section 251 of the Telecommunications Act, and the Commission should not permit it to occur in this proceeding.

While section 251(c)(3) of the Act permits requesting carriers to obtain access to UNEs to provide telecommunications services, such access need be provided only when failure to provide such access would "impair" the ability of a requesting carrier to provide its services.[3] A carrier's ability to provide service is "impaired" if, taking into consideration the availability of alternative elements outside the incumbent local exchange carrier's (LEC) network, lack of that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer.[4]

The record in this proceeding is replete with evidence that the lack of access to loop-transport combinations does not materially diminish a requesting carrier's ability to provide access services. In applying the Act's impairment test, the Commission has "recognize[d] that the existence of some significant level of competitive LEC facilities deployment is probative of whether competitive LECs are impaired from providing service within the meaning of section 251(d)(2) . . . ."[5] It further found "the marketplace to be the most persuasive evidence of the actual availability of alternatives as a practical, economic, and operational matter."[6]

Competition in the special access market is robust and thriving. As early as 1992, the Commission concluded that "competition is already developing relatively rapidly in

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[3] 47 U.S.C. § 251(d)(2).

[4] 47 U.S.C. § 251(c)(3).

[5] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696 at ¶ 53 (2000). (FNPRM).

[6] FNPRM at ¶ 66.

the urban markets [for special access services]."[7] Today, there are more than 100 carriers successfully provisioning competitive access services.[8] In 1995, competitive access providers earned approximately $500 million in special access/private line revenues; three years later their revenues had increased fivefold – to $2.5 billion.[9] In 1999, competitive access provider revenue for special access and private line services is projected to have doubled again—to $5.7 billion.[10]

Furthermore, competitive access providers have garnered an estimated 33% market share of all special access and private line revenue.[11] Contrary to any sign of impairment, the ability to compete *without* access to UNEs is clearly evident from the record. The Commission must therefore conclude that barring access to combinations of UNEs would not materially diminish a requesting carrier's ability to provide special access service.

II. Existing Restrictions Must Remain in Place Until the Commission Fully Addresses Jurisdictional Cost Recovery Issues.

Even if it could be shown that access to combinations of UNEs would somehow impair a carrier's ability to provide interstate access services, existing restrictions must be left in place until such time that the Commission fully addresses the complex jurisdictional cost recovery issues that will arise if carriers are permitted to substitute

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[7] *Expanded Interconnection With Local Telephone Company Facilities,* CC Docket No. 91-141, Amendment of the Part 69 Allocation of General Support Facility Costs, CC Docket No. 92-222, *Report and Order and Notice of Proposed Rulemaking*, 7 FCC Rcd 7369 at ¶ 177 (1992).

[8] Peter W. Huber & Evan T. Leo, Special Access Fact Report at 5 (FCC filed Jan. 19, 2000)(Special Access Report).

[9] Special Access Report at 6.

[10] *Id.*

UNEs for interstate and intrastate access services. Failure to do so would undermine the Commission's access charge plan as well as state access charge regimes, and cause serious harm to LECs, telephone subscribers, and universal service in the process.

The Commission itself has stated that in "the absence of completed implementation of access charge reform, allowing the use of combinations of unbundled network elements for special access could undercut universal service by inducing IXCs to abandon switched access for unbundled network element-based special access on an enormous scale."[12] Furthermore, "permitting the use of combinations of unbundled network elements in lieu of special access services could cause substantial market dislocations and would threaten an important source of funding for universal service."[13] The Commission has also recognized that substitution of UNE combinations would be "undesirable as a matter of both economics and policy, because carrier decisions about how to interconnect with incumbent LECs would be driven by regulatory distortions in our access charge rules and our universal service scheme, rather than the unfettered operation of a competitive market."[14]

This threat on the entire interstate access regime would be massive, putting in jeopardy the recovery of $2.5 billion in costs assigned to the NECA common line and traffic sensitive pool alone. The nearly 1200 small, mostly rural LECs participating in

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[11] *Id.*

[12] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *Supplemental Order Clarification*, 15 FCC Rcd 9587 at ¶7 (2000).

[13] *Id.* at ¶9.

[14] *See* Implementation of the Local Competition Provision in the Telecommunications Act of 1996, CC Docket No. 96-98, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, *First Report and Order,* 11 FCC Rcd 15499 at ¶719 (1996). (*First Report and Order*).

NECA's pools serve consumers in approximately 65% of the geographic area of the United States, plus Puerto Rico, Guam, and American Samoa. To the extent that TELRIC-based UNE prices differ from access rates, loss of this critical revenue stream could cause massive shifts in costs from the interstate to the state jurisdiction, with dramatic, adverse effects on local ratepayers.

Consequently, it is eminently reasonable, and well within the Commission's discretion under the Act, to continue the current policy regarding the use of UNE combinations. The Commission has "ample legal authority" pursuant to sections 4(i) and 251(g) of the Act, to require carriers obtaining combinations of UNEs as a substitute for access services to pay access charges.[15] In its November 24, 1999 *Supplemental Order* in CC Docket No. 96-98, for example, the Commission determined that interexchange carriers (IXCs) may not convert special access services to combinations of unbundled loop and transport network elements.[16]

More recently, in its *Supplemental Order Clarification*, the Commission specified three circumstances under which requesting carriers are deemed to provide a "significant" amount of local exchange service, and can thus be relieved of the constraint.[17] For each of these three "safe harbor" provisions, the Commission explicitly

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[15] *Id.* at ¶ 726-732.

[16] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *Supplemental Order*, 15 FCC Rcd 1761 at ¶ 4 (2000).

[17] *Id.* at ¶ 22. These provisions require, in part, that (1) the requesting carrier certifies it is the exclusive provider of an end user's local exchange service. Loop-transport combinations must terminate at the requesting carrier's collocation arrangement in at least one ILEC central office; or, (2) the requesting carrier certifies that it provides local exchange and exchange access service to the end user customer's premises an00d handles at least on third of the end user customer's local traffic measured as a percent of total end user dialtone lines. For DS1 circuits and above, at least 50 percent of the activated channels on the loop portion of the loop-transport combination have at least 5 percent local voice traffic individually; or, (3) the requesting carrier certifies that at least 50 percent of the activated channels on a circuit are used

stated that the "option does not allow loop-transport combinations to be connected to the incumbent LEC's tariffed services."[18]

The 1996 Act clearly contemplates that current interstate cost recovery mechanisms should remain in place unless the Commission takes specific, considered action to revise them.[19] If the Commission were to permit free substitution of UNEs for interstate access services, however, existing cost recovery mechanisms would be *de facto* abandoned, without any "considered action" taken by the Commission. Adopting a course in this proceeding with such drastic adverse consequences to the *status quo* would certainly run afoul of the intent of Congress.

Adherence to the existing regime remains necessary until the Commission fully harmonizes its Part 32, 36, 61, 69 and 51 cost allocation and pricing rules so that one set of rules does not act to undermine the others. This would be "just and reasonable" pursuant to section 251 of the Act, and in such circumstances, a reviewing court would likely defer to the Commission's interpretation of the statute.[20]

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to provide originating and terminating local dialtone service and at least 50 percent of the traffic on each of these channels is local voice traffic, and the entire loop facility has at least 33 percent local voice traffic.

[18] *Id.* This restriction was undoubtedly placed in each of the safe harbor provisions to eliminate the possibility of the options being used as an end run-around the access charge regime. The Commission explained that it was "not persuaded ... that removing this prohibition would not lead to the use of unbundled network elements by IXCs solely or primarily to bypass special access services. *Id.* at ¶ 28.

[19] The language of section 251(g) makes clear that Congress intended *no* provision of the 1996 Act (including the interconnection requirements of section 251) to supersede established interstate Commission rules, absent a considered decision by the Commission. The legislative history for the Senate bill version of section 251 of the Act is even more explicit: [N]othing in this section is intended to affect the Commission's access charge rules." Telecommunications Act of 1996, H.R. Report 104-458, *Joint Explanatory Statement* at 117. More fully, the passage excerpted above reads: "The obligations and procedures prescribed in this section [251] do not apply to interconnection arrangements between local exchange carriers and telecommunications carriers under Section 201 of the Communications Act for the purpose of providing interexchange service, and nothing in this section is intended to affect the Commission's access charge rules."

[20] *Id.*

Merging UNEs and access would be a most complex undertaking. In addition to potential modifications to the universal service and access pricing reforms now under review by the Commission in consideration of the RTF and MAG proceedings,[21] extensive revisions to the Commission's accounting and separations rules would be required. Such revisions would be necessary to assure consistency between these regulations and the Commission's cost recovery rules.

Even if current access reform efforts somehow result in access rates and UNE prices reaching equivalent levels (an unlikely scenario, given the different jurisdictional regimes and regulatory methods governing access and UNEs), it remains unclear how these disparate cost recovery mechanisms could co-exist in the marketplace if the Commission allowed substitution of UNEs for tariffed access services. Current access charge mechanisms assume, for example, that carrier costs are divided between the interstate and intrastate jurisdictions and that resulting interstate costs are allocated to specific access elements and recovered pursuant to interstate access tariffs. The Commission appears in the past to have regarded UNE pricing methods as existing somehow outside this state-interstate jurisdictional scheme.[22] "Real world" market effects, however, would quickly create jurisdictional chaos if current usage restrictions are abandoned. Moreover, the ramifications of such a change on the complex web of state and federal universal service mechanisms are completely uncharted and may cause

[21] *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *Third Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 96-98, 15 FCC Rcd 3696 (2000).

[22] *First Report and Order* at ¶364; NECA has a petition for reconsideration of the Commission's Order, which is still outstanding. NECA *Petition For Reconsideration*, CC Docket Nos. 96-98, 95-185, FCC 96-325 (filed Sep. 30, 1996). ("NECA highlights the need for clarification of the interrelationships between the new interconnection rules implementing section 251 of the Act on the one hand, and the existing accounting, separations, universal service and access charge rules on the other.").

serious harm to local exchange carriers, especially small and rural incumbent LECs and their subscribers.

To avoid these untoward effects, regulators on both the federal and state levels must thoroughly re-think existing cost recovery mechanisms, a process that will take considerable time and effort. Until that process is completed, however, the Commission must continue existing restrictions on the use of UNEs as a substitute for access services.

CONCLUSION

The Commission must maintain its focus on reforming existing compensation mechanisms, not undermining them. The record shows that commingling of UNEs and tariffed services threatens the Commission's access charge and universal service regimes. The Commission has both the authority and the responsibility under the Tele-communications Act to assure that the existing access charge structure remains viable pending comprehensive review and revision of the basic tenets of our dual jurisdictional regulation, as well as the necessary follow on reform of the separations and access charge regime. Pending completion of this comprehensive reform, the Commission should not permit UNEs to be used for the purpose of avoiding interstate access charges.

Respectfully submitted,

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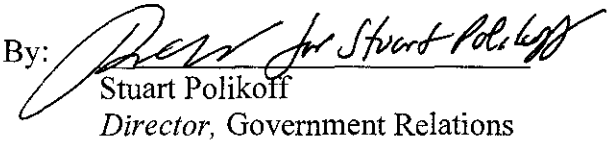
By: 
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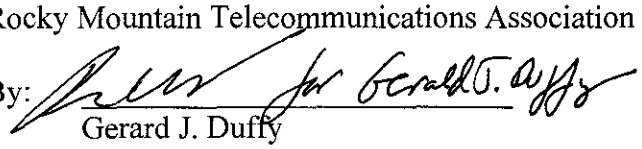
By: 
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